STATE OF MICHIGAN

COURT OF APPEALS

DANIEL T. SMITH, SR.,

Plaintiff-Appellant,

v

MICHAEL A. CIARAMITARO and SHERRIE R. CIARAMITARO,

Defendants-Appellees.

UNPUBLISHED
September 2, 2010

No. 291538
Roscommon Circuit Court
LC No. 08-727049-CH

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case concerns the issue of whether plaintiff has a prescriptive easement over defendants' 40-acre parcel of land. The facts are largely not in dispute. The land is unimproved and is undeveloped, although a house stood on the land for a while several decades ago but later burned down. The land is not enclosed, although there is evidence that a fence once ran along one edge. The area around the parcel is allegedly surrounded by 46 separate lots, with houses and other structures. A two-track road traverses the property, and plaintiff had used it to access his landlocked property, a 40-acre parcel adjacent to defendant's land. Defendants purchased the property in 1994 and placed an unlocked gate across the two-track in 2004, and later built their house on it. From 1932 to 1994, the property was owned by an out-of-state religious organization and was only visited by agents of the organization three times in 62 years. Defendants purchased the property in 1994, placed an unlocked gate across the two-track in 2004, and later built their house on the property

In 2006, defendants put a lock on the gate across the two-track, and plaintiff brought suit, claiming he had a prescriptive easement across the land. Defendants moved for summary disposition, arguing that because the land was wild and unenclosed there was a higher burden on plaintiff to prove notice, and that plaintiff had failed to establish that element. The trial court agreed, holding that the land was wild and unenclosed so the higher burden applied, and that plaintiff failed to show defendant had notice of his claim.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

We agree with the trial court and defendants that the land in question here is wild and unenclosed. Plaintiff asserts that we should examine the nature of property surrounding the parcel here at issue, but under existent case law, the character of the subject parcel controls, not that of neighboring parcels. See *Barley v Fisher*, 267 Mich 450; 255 NW 223 (1934); *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). Plaintiff cites no law in support of his position that the character of surrounding parcels is relevant.

We next consider whether plaintiff's use of the land, and the improvements he made to the two-track, provided defendants with sufficient notice of his adverse claim. "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). Under the wild and unenclosed lands doctrine, the claimant has to meet a higher burden of notice because permissive use is presumed. In contrast to the mere use of enclosed premises, use alone

> . . . raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. The custom had been particularly general as to logging roads over timber lands until the carelessness of hunters and campers produced such fire hazards that the protection of timber required the permission to be circumscribed. The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's land by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription. [*Du Mez*, 257 Mich at 451.]

In this case, plaintiff merely used the two-track to access his own property, and sometimes for hunting. Even combined with evidence of his maintenance of the track, under the case law cited above, the acts are insufficient to give defendants notice of a claim of right.

Plaintiff's argument—that, under *Reed v Soltys*, 106 Mich App 341; 308 NW2d 201 (1981), the long-term adverse use gave rise to the presumption that the use was not permissive—fails because that rule was not applied to wild and unenclosed lands in *Reed*. Rather, *Reed* dealt with a mutual driveway, shared by two, developed parcels. Plaintiff cites no law in support of his assertion that the long term adverse use doctrine modifies in any respect the wild and unenclosed land doctrine of *Du Mez*. In any event, plaintiff produced no evidence that defendants had notice of hostile possession and permissive use is presumed.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad